

9/6/01

**THIS DISPOSITION
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Paper No. 26
TJQ

UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Richard W. (Skip) Beall, III
v.
Kenneth Charles Zima

Opposition No. 108,351
to application Serial No. 75/132,499
filed on July 11, 1996

Richard W. (Skip) Beall, III, *pro se*.

Kenneth Charles Zima, *pro se*.

Before Quinn, Hohein and Hairston, Administrative
Trademark Judges.

Opinion by Quinn, Administrative Trademark Judge:

An application has been filed by Kenneth Charles
Zima to register the mark shown below

for "clothing, namely, men's and women's T-shirts, shorts, swimwear, sweatshirts, sweatpants, wetsuits, vests, shirts; and headwear, namely, visors, caps, and hats; and footwear, namely, boots, shoes, sandals, and slippers."¹

Registration has been opposed by Richard W. (Skip) Beall, III under Section 2(d) of the Trademark Act on the ground that applicant's mark, when applied to applicant's goods, so resembles the following previously used and registered marks as to be likely to cause confusion:

and

both for "clothing, namely men's and women's T-shirts, sweatshirts, sweatpants, swimwear, knit shorts, walk-shorts, pants, caps, hats, jackets, wetsuits; and footwear, namely boots, shoes, sandals and slippers."²

¹ Application Serial No. 75/132,499, filed July 11, 1996, based on an allegation of a bona fide intention to use the mark in commerce.

² Registration No. 1,785,640, issued August 3, 1993, Section 8 affidavit accepted, Section 15 affidavit acknowledged, and

Applicant, in his answer, denied the allegations of likelihood of confusion.

The record consists of the pleadings; the file of the

involved application; and certified copies of two of opposer's pleaded registrations that accompanied the notice of opposition.³ Applicant neither took testimony nor properly introduced any other evidence. After the Board's issuance of a show cause order under Trademark Rule 2.128(a)(3) due to opposer's failure to file a brief, opposer requested that his "testimony" filed on December 29, 1999 be considered as his brief on the case. The Board, in an order dated December 9, 2000, discharged the show cause order and stated that "opposer's submission of his testimony to be used also as his main brief is noted."⁴ Applicant did

³ A certified copy of opposer's Registration No. 1,940,424 for the mark GROOVY LONGBOARDS for "T-shirts, hats, shorts, pullovers, jackets, shirts, sweatshirts, tank tops and swimsuits" also accompanied the notice of opposition. A check of Office records shows, however, that the registration was cancelled on April 6, 2000 as a result of a final Board order issued in Cancellation No. 28,812 on February 1, 2000. When a Federal registration owned by a party has been properly made of record in an inter partes proceeding, and there are changes in the status of the registration between the time it was made of record and the time the case is decided, the Board, in deciding the case, will take judicial notice of, and rely upon, the current status of the registration, as shown by the records of the PTO. *Royal Hawaiian Perfumes, Ltd. v. Diamond Head Products of Hawaii, Inc.*, 204 USPQ 144 (TTAB 1979). See also, *TBMP* §703.02(a).

⁴ To the extent that opposer would have us consider his "testimony" as his brief, we decline to do so. This submission is more in the nature of an evidentiary showing as opposed to argument. Even if considered as a brief, however, exhibits and other evidentiary materials attached to a party's brief on the case can be given no consideration unless they were properly made of record during the time for taking testimony. *TBMP* §705.02 and cases cited therein, e.g., *Maytag Co. v. Luskin's*,

not file a brief.

Before proceeding to the merits of the opposition, the Board is compelled to comment on the slim record upon which our decision must be based. The proceeding file is full of evidentiary matter that was not properly introduced at trial and, therefore, has not been considered by us in reaching our decision. The evidentiary problems undoubtedly were caused by the fact that both parties acted *pro se* in this case.

As for opposer's part, his "testimony" was submitted essentially as a declaration with attachments. Such testimony may be submitted, but only by written agreement of the parties. Trademark Rule 2.123(b). No such agreement is present here. The notice of reliance on opposer's registrations was superfluous, given that the registrations were properly introduced with the notice of opposition. Trademark Rule 2.122(d)(1). Lastly, the notice of reliance on printed publications is defective in that the materials sought to be introduced do not

Inc., 228 USPQ 747 (TTAB 1986). Further, factual statements made in a party's brief on the case can be given no consideration unless they are supported by evidence properly introduced at trial. Statements in a brief have no evidentiary value, except to the extent that they may serve as admissions against interest. *TBMP* §706.02. In the present case, none of opposer's "testimony," including the attached materials, were properly made of record (see discussion, infra) and, thus, any

constitute "printed publications" as contemplated by
Trademark Rule 2.122(e). See: *TBMP* §708 and cases cited
therein, including *Glamorene Products Corp. v. Earl*
Grissmer Co., 203 USPQ 1090 (TTAB 1979); *Wagner Electric*
Corp. v. Raygo Wagner, Inc., 192 USPQ

factual statement made on the basis of those materials could not
be considered.

33 (TTAB 1976); *Andrea Radio Corp. v. Premium Import Co.*, 191 USPQ 232 (TTAB 1976); and *Minnesota Mining & Manufacturing Co. v. Stryker Corp.*, 179 USPQ 433 (TTAB 1973).

The only matter submitted by applicant was a document captioned "Discovery" with several attachments. This matter was filed outside of the time for taking testimony and, moreover, none of the materials was introduced in accordance with the Trademark Rules of Practice.

Realizing the shortcomings of the record due to the parties' unfamiliarity with the rules, we now turn to the merits of the notice of opposition.

In view of opposer's ownership of valid and subsisting registrations for its marks, there is no issue with respect to opposer's priority. *King Candy Co. v. Eunice King's Kitchen, Inc.*, 496 F.2d 1400, 182 USPQ 108 (CCPA 1974).

Our determination under Section 2(d) is based on an analysis of all of the facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In *re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations

are the similarities or dissimilarities between the marks and the similarities or dissimilarities between the goods. *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24 (CCPA 1976).

Turning first to the goods, the items in the identifications are, in large part, identical, and otherwise closely related. Opposer's registrations and the involved application list T-shirts, shorts, swimwear, sweatshirts, sweatpants, wetsuits, caps, hats, boots, shoes, sandals and slippers. Further, the vests and shirts in the application are very similar to opposer's clothing items. In cases such as this involving identical goods, "the degree of similarity [between the marks] necessary to support a conclusion of likely confusion declines." *Century 21 Real Estate Corp. v. Century Life of America*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992).

Further with respect to the goods, the parties' clothing items must be assumed to be of all such types, including inexpensive items. Given the relatively inexpensive nature of items such as T-shirts, caps, hats and slippers, and the fact that the parties' clothing items are subject to frequent replacement, ordinary consumers are not likely to exercise any great care in

purchasing these goods. See: Specialty Brands, Inc. v. Coffee Bean Distributors, Inc., 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984). This factor weighs in favor of finding a likelihood of confusion.

With respect to the marks, we find that opposer's marks LONGBOARD and design and LONGBOARDS RULE and design are sufficiently similar to applicant's mark TOES OVER ONLY ON A LONGBOARD and design that, when applied to the same relatively inexpensive clothing items, consumers are likely to be confused. *Based on the evidence of record*, the term "LONGBOARD" would appear to be, at worst, suggestive when applied to clothing that might be worn by surfers. The inclusion of LONGBOARD in applicant's mark creates a similar overall commercial impression with opposer's marks, both of which are dominated by LONGBOARD or LONGBOARDS. Although we have considered the prominently displayed TOES OVER in applicant's mark, we do not view this portion of the mark to sufficiently distinguish the mark from opposer's mark.

To the extent that the differences between the parties' marks cast any doubt on our finding of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. Giant Food, Inc.

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v. Nation's Foodservice, Inc., 710 F.2d 1565, 218 USPQ
390, 395 (Fed. Cir. 1983).

Decision: The opposition is sustained, and
registration to applicant is refused.